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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

H.L. NIX AND ARLENE NIX, Individually and as Administrators of the Estate of H.L. Jeremiah Nix, Jr., Deceased,

Petitioners,

vs.

FRANKLIN COUNTY SCHOOL DISTRICT; PAUL E. BROWN, Individually and In His Capacity as a Teacher for Franklin County High School; JACK SLATON, Individually and In His Capacity as the Principal of Franklin County High School; and THOMAS BRIDGES, Individually and In His Capacity as the Superintendent of Franklin County Schools,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED FOR REVIEW

I. Is the test for qualified immunity in the Eleventh Circuit inconsistent with decisions of this Court and other circuits?

II. Does the Eleventh Circuit's application of the "state-created danger" theory conflict with other circuits?

III. Is the question as to whether the school is a custodian of the student unsettled in all the circuits, and does the school, in fact, have functional custody of the student while at school?

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceedings are listed below:

1. ARLENE NIX, *Petitioner*
2. H. L. NIX, *Petitioner*
3. H.L. NIX and ARLENE NIX, as ADMINISTRATORS OF THE ESTATE OF JEREMIAH NIX, *Petitioners*
4. THOMAS BRIDGES, Individually and in His Capacity as Superintendent of Franklin County Schools, *Respondent*
5. PAUL E. BROWN, Individually and in His Capacity as a Teacher for Franklin County High School, *Respondent*
6. JACK SLATON, Individually and in His Capacity as Principal of Franklin County High School, *Respondent*
7. FRANKLIN COUNTY SCHOOL DISTRICT, *Respondent*

SELECTIVE INSURANCE COMPANY, Insurer for Franklin County Schools, and Its Employees, Defendants / Respondents

CHARLES W. STEPHENS, Stephens and Shuler, Counsel of Record for Petitioners, is a sole proprietorship and has no stock. There is no parent or publicly held corporation owning 10% or more of this sole proprietorship.

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CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for which review is sought is reported at 311 F.3d 1373 (11th Cir. 2002) (App. A). That Opinion affirmed the District Court's Order on Defendants' Motion for Summary Judgment entered on February 13, 2002. (App. B).

BASIS OF JURISDICTION

The Eleventh Circuit entered the judgment below on November 18, 2002 (App. C). There was no request for rehearing. Jurisdiction is based upon 28 U.S. C. §1254.

CONSTITUTIONAL PROVISIONS

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE AND PROCEEDINGS

On February 13, 2002, the Honorable Hugh Lawson, Judge of the United States District Court, Middle Division of Georgia, entered his final order granting Defendants' motion for summary judgment disposing of all of Plaintiffs' claims and finding that (1) Defendants had violated no clearly established Constitutional right of Jeremiah Nix and had not violated 42 U.S.C. §1983 and pendent state laws for the wrongful death of Jeremiah Nix, and that Jeremiah's injury and death were self-inflicted; (2) Defendants had no Constitutional duty to protect Jeremiah Nix in the classroom setting; and (3) Defendants are entitled to qualified immunity. Appeal to the Eleventh Circuit Court of Appeals followed, and the Court affirmed the judgment of the District Court on November 18, 2002, concluding that the facts of this case did not justify a cause of action based upon the Constitution in that no violation rising to the level of a constitutional violation had been breached.

Seventeen year old Jeremiah Nix, a student at Franklin County High School was electrocuted to death with over 700 volts of live electricity in an electromechanical classroom. Defendant Paul Brown, his teacher, designed and conducted the exercise that killed Jeremiah Nix. The exercise was set up by Paul Brown and completely controlled by Paul Brown. He instructed the students to arrange their work tables in a circle around the classroom. He then laid out a length of continuous insulated electrical cable around the room so that each

student would have a section of cable in front of him on top of his table. In order to conduct the exercise, Mr. Brown had cut away the insulation in the cable approximately every 18 inches, exposing naked wire which would become live with electricity at the fingertips of each student. At the naked wire, Mr. Brown had the students place metal probes which were connected to individual voltmeters. These probes were not clipped onto the wire, but were simply placed loosely on the wire, requiring the students to reposition the probes any time contact with the naked wire was lost. The cable was connected to an electrical transformer which would boost the electrical output from an ordinary electrical outlet. The transformer had a mechanism for increasing the power output to the cable and an on/off switch. Mr. Brown conducted the exercise by increasing the power through the transformer in increments, allowing the students to obtain readings from their individual voltmeters, and by turning the transformer on and off. Mr. Brown had sole control of the transformer controls and never allowed the students to control the transformer.

On November 3, 1997, as the voltmeter readings reached in excess of 700 volts, Jeremiah's hands came into contact with the live electricity in either his probes or the naked wire on the cable and he was electrocuted. It could just as easily have been the hands of twenty-five students, all at the same time. No one knows precisely how this happened to Jeremiah, but several opinions have been offered, including that the transformer was malfunctioning; it had for some time been blowing fuses

and showing that it was off when it was, in fact, on. Mr. Brown said he thought he had it fixed, but does not know.

Defendant Brown was well aware that over a long number of years students had been shocked. He knew students were coming into contact with live current and he knew students were being shocked both accidentally and intentionally. On deposition Defendant Brown agreed that the students in the electromechanical class did, in fact, customarily touch the probes; he conceded that he had very few classes over the years in which students had not touched the probes and electrical wires. He knew that the students were being shocked, and he usually saw a visible reaction from them when it happened. He knew that occasionally students would get shocked accidentally when they would "get their hands in the wrong place at the wrong time." He also knew that throughout the years he had taught the course, the probes often came off of the live wire as a result of being bumped or because of someone pulling on the wire, and that students moved the probes to make a better connection.

A few days prior to the electrocution death of Jeremiah Nix, a parent of one of Mr. Brown's students in the same class, Dr. Judy Jarecki-Black, called the Franklin County High School requesting to speak with a school official because she had learned from her son that students were being shocked with electricity in the electromechanical class; her call was ignored and within a few days Jeremiah Nix was dead.

When Defendant Brown was asked if he felt it was reasonable to have so many students with live electricity in front of them, he said it had been happening for so many years that it was considered "normal". He agreed it had become custom and that, as far as he was aware, the Franklin County School Board and his superiors were aware of that custom. Defendant Paul Brown knew that neither the procedures utilized in his course nor the discipline and the attention to the safety of his students had been reliable. Nonetheless, in the customary evaluation procedures that were done relating to his teaching of the electromechanical class, he was always told that what he was doing was acceptable. He was given the impression by his superiors that the safety procedures that he was using in the classroom were acceptable as specifically related to the handling of up to 700 volts of electricity. He had been following those procedures which he said had been approved by the School Board for 23 years. The Franklin County School District through its officials had a long history of condoning the exposure of twenty-five to thirty school kids (ninth through 12th graders) to high levels of electricity, simultaneously, with only one teacher supervising the exposure of all these school kids; they were deliberately indifferent to the risk of injury or death. The Defendants, through their conduct, actions, and lack of actions, created the incubator for predictable and inevitable disaster.

District Court: The District Court concluded that the facts of this case did not justify a cause of action in that Defendants' conduct did not violate a "clearly established"

statutory or constitutional right, state officials did not create the danger which killed Jeremiah Nix, Defendants are entitled to qualified immunity, and Defendants were entitled to summary judgment in their individual and official capacities.

Appellate Court: The Eleventh Circuit affirmed the District Court's judgment and also found that Plaintiffs had failed to show that Defendants' conduct shocks the conscience, but stated that the "holding is a narrow one; it would not necessarily control, say, a similar accident in a 4th grade classroom, or even other types of seriously harmful behavior occurring in a high-school class."

REASONS FOR GRANTING THE WRIT

The test for qualified immunity in the Eleventh Circuit is inconsistent with decisions of this Court and other circuits in that it adheres to a "bright line" level of factual similarity with existing U.S. Supreme Court, Eleventh Circuit or Georgia's Supreme Court cases to determine "clearly established" law. Because state actors have little liability to fear, they are not limited in their actions, and the Eleventh Circuit's approach leaves victims of unconstitutional conduct by state actors without a remedy for the injuries they suffer. The Sixth Circuit's similarly harsh test for determining clearly established law was rejected by this Court in United States v. Lanier, 520 U.S. 529 (1997) and, more recently, this Court rejected it in Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L.Ed. 2d 666 (2002).

The Eleventh Circuit's decision in this case also conflicts with other circuits regarding what constitutes a "state- created danger." When state actors knowingly place a person in danger, the due process clause of the Constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state "custody". This principle has been applied in a number of cases from other circuits as shown in Wood v. Ostrander, 879 F.2d 583 (9th Cir.1989), *cert. denied,* 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990); K.H. ex rel. Murphy v. Morgan, 914 F.2d 846 (7th Cir.1990); White v. Rochford, 592 F.2d 381, 384-85 (7th Cir.1979).

I. THE TEST FOR QUALIFIED IMMUNITY IN THE ELEVENTH CIRCUIT IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

"[A]ctions for damages may offer the only realistic avenue for vindication of constitutional guarantees." Harlow v. Fitzgerald, 457 U.S. 800, 814 (1981). As this Court has also recognized, a right without a remedy is a right in name only. Bell v. Hood, 327 U.S. 678, 684 (1946). The doctrine of qualified immunity represents an exception to that rule. It protects state actors against liability when the law is unsettled, even if their actions are later declared unconstitutional.

The approach followed by the Eleventh Circuit reflects an ongoing confusion in the lower courts about

how to determine when the "contours of a right are sufficiently clear" that its violation should be "apparent." Anderson v. Creighton, 483 U.S. 635, 640 (1987). The Eleventh Circuit's test is not reconciled with that of other circuits. See, Brown v. Muhlenberg Township, 269 F.3d 205 (3rd Cir. 2001) (law may be clearly established "despite a circuit split" and even absent a "binding precedent" on point); Alvarado v. Litscher, 267 F.3d 648 (7th Cir. 2001)("petitioner does not need to point to a case identical to his own"); McClendon v. City of Columbia, 258 F.3d 432 (5th Cir. 2001)(rejecting "excessively formalistic" and "rigid" qualified immunity inquiry requiring a case on point); Despain v. Uphoff, 264 F.3d 965 (10th Cir. 2001)("facts of previous decisions need not correlate exactly with those of the case at issue, as long as there is 'some factual correspondence' between the two"); Cerrone v. Brown, 246 F.3d 194 (2nd Cir. 2001)(law must be defined with "reasonable clarity"); Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001)("perhaps because the proposition is virtually self-evident, we are not aware of any cases that have expressly recognized the specific right, but that does not mean that there is no such [clear] right"); Burgess v. Lowery, 201 F.3d 942 (7th Cir. 2000)

> ("[t]o rule that until the Supreme Court has spoken, no right of litigants in this Circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be certain to be unable to obtain any damages")(emphasis in original).

In Lanier and now Hope the Court rejected the view that state actors can be held personally liable for a constitutional violation only if the contours of the right have been defined with particularity in a previously decided case with "fundamentally similar" facts. Lanier, 520 U.S. at 269. Finding that the "extreme level of factual specificity" required by the Sixth Circuit rule "would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling," the Court rejected the rule as applying the "wrong gauge" for liability. Id. at 270, 272. While "prior decisions [should give] reasonable warning that the conduct then at issue violated constitutional rights," the "very action in question" need not have "previously been held unlawful." Id. at 268-71 (quoting Anderson , 483 U.S. at 640).

Like the Sixth Circuit test rejected in Lanier, the Eleventh Circuit's test for qualified immunity, now solidified in three en banc decisions:

(1) Lassiter v. Alabama A & M Univ., 28 F,3d 1146 (11th Cir. 1994) (en banc) (qualified immunity precludes recovery unless the plaintiff can point to a "materially similar" case on a "specific, factually defined level");

(2) Jenkins v. Talladega City Bd. Of Educ., 115 F.3d 821, 825 n.3 (11th Cir. 1997)(en banc) (refusing to consider Eleventh Circuit test in light of Lanier);

(3) Marsh v. Butler Cty., 268 F.3d 1014 (11th Cir. 2001)(en banc) ("The two sets of facts must be materially similar.") (emphasis added); see

> also, Gonzalez v. Lee Cty. Housing Auth., 161 F.3d 1290, 1295 (11th Cir. 1998)("[t]his circuit has established stringent standards for a plaintiff seeking to overcome the affirmative defense of qualified immunity"),

applies the "wrong gauge in deciding whether prior judicial decisions gave fair warning that [state actors] actions violated constitutional rights." Lanier, 520 U.S. at 272. The circuit's "materially similar" on a "specific, factually defined level" test – almost always requiring a case on point from this Court, the Eleventh Circuit itself, or the Georgia Supreme Court – compelled the panel to find that law governing this case was not clearly established even though the actions of state actors resulted in the death of a teenage high school student.

II. THE ELEVENTH CIRCUIT'S APPLICATION OF "STATE-CREATED" DANGER CONFLICTS WITH OTHER CIRCUITS AND SHOULD BE SETTLED BY THIS COURT. THIS CASE JUSTIFIES A FINDING THAT A CAUSE OF ACTION BASED UPON A CONSTITUTIONAL VIOLATION OCCURRED IN THAT THE STATE CREATED AND SUBJECTED JEREMIAH NIX TO THE DANGER WHICH KILLED HIM.

The Eleventh Circuit and the District Court applied the wrong standard in finding that the State owed no duty to Jeremiah Nix based on DeShaney v. Winnebago Social Services Department, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1988). In DeShaney a child was beaten and

injured by his natural father. The child was not in the custody or control of the state and the natural father was by no means an agent of the state. The court affirmed that the "Due Process Clause of the Fourteenth Amendment does not require a state or local governmental entity to protect its citizens from 'private violence or other mishaps not attributable to the conduct of its employees.'" Although the Defendants assert that Jeremiah was killed through his own negligence, this case is completely different from DeShaney.

The fact is, no matter how Jeremiah got his fingers on the live wire, his death was caused by the special danger created by his teacher, Paul Brown, and the long-standing customs and practices ratified by the administrative officials of Franklin County High School and Franklin County School District. Under all the facts, the conduct of the Defendants constituted a deliberate indifference to the safety of Jeremiah Nix and other Franklin County High School students. The methods and procedures used by teacher Paul Brown and ratified by the administrative officials of Franklin County High School and Franklin County School District for 23 years constituted the equivalent of a ticking time bomb waiting to explode in a high school classroom; sooner or later it was inevitable that some student would likely be injured or killed. Defendant Brown's actions were not much different than if he had placed loaded guns in the hands of each student.

"The language of DeShaney 'leave[s] room' for state liability where the state creates a danger or renders an individual more vulnerable to it." Wyke v. Polk County School Board, et al. 129 F.3d 560 (11th Cir. 1997). When state actors knowingly place a person in danger, the due process clause of the Constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state "custody". This principle has been applied in a number of cases from other circuits. The following cases exemplify the state-created danger theory of liability:

(1) In Wood v. Ostrander, a police officer arrested a drunken driver and impounded his car, leaving the female passenger alone at night, without any means to get home, in a neighborhood known for criminal activity. She was raped by a stranger who offered her a lift.

(2) In Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir.1989), *cert. denied,* 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990), the state permitted a prisoner with a violent criminal history to participate in a work program at a municipal town hall under the supervision of an untrained city employee. He gained access to a knife, abducted the plaintiff who worked for the city, and held her hostage for three days.

(3) In K.H. ex rel. Murphy v. Morgan, 914 F.2d 846 (7th Cir.1990), the state removed a sixteen-month-old child from her parents' custody and in the next four years shuttled her among eleven foster homes, in at least two of which she was molested or abused. The

court held that, if the allegations of the child's complaint were correct, state officials could be guilty of knowingly subjecting her to serious psychological damage.

(4) See also, White v. Rochford, 592 F.2d 381, 384-85 (7th Cir.1979) where the state was held liable for injuries to minor children left in a car on the side of a busy highway after the state officer arrested the driver.

Although different facts underlie each of these cases, the courts uniformly held that state actors may be liable if they created the plaintiff's peril, increased their risk of harm, or acted to render them more vulnerable to danger. In this case the instrumentality of death was actually supplied by the state actors: the school district, the school administrators and the teacher. Jeremiah Nix was placed in mortal danger solely by virtue of the actions of these Defendants. Not only was the instrumentality of death provided by the Defendant state actors, but it was the hands of the Defendant teacher, Paul Brown, which were on the switch to the power and also controlled the amount of voltage to which each student was exposed. It was the Defendants who controlled the choice of equipment, as well as the setup of the equipment. It was the Defendant teacher who knew the transformer had been malfunctioning. And, it was the Defendants who controlled the behavior of each student while being exposed to high voltage electricity.

Liability may attach where:

(1) the harm ultimately caused was foreseeable and fairly direct;

(2) the state actor acted in willful disregard for the safety of the plaintiff;

(3) there existed some relationship between the state and the plaintiff;

(4) the state actors used their authority to create an opportunity that otherwise would not have existed.....

Kneipp v. Tedder, 95 F.3d 1199, 1208 (3rd Cir. 1996). In evaluating these four prongs, the Court also must find that the defendants' actions meet the standard of fault necessary to trigger Section 1983 liability. It does not require proof of intent to harm as contemplated by the Eleventh Circuit's order in this case.

III. THE ROLE OF THE SCHOOL AS CUSTODIAN IS UNSETTLED IN ALL THE CIRCUITS AND THIS COURT IS REQUESTED TO RESOLVE WHETHER SCHOOL CHILDREN, THOUGH NOT IN THE ACTUAL CUSTODY OF THE SCHOOL, HAVE A SPECIAL RELATIONSHIP TO THE STATE AND WHILE ATTENDING SCHOOL, THEY ARE FUNCTIONALLY IN THE CUSTODY OF STATE OFFICIALS AND ARE DEPENDENT UPON THE STATE FOR BASIC NEEDS, PROTECTION AND PRESERVATION OF THEIR LIVES.

Courts have held that the State does not have a constitutional obligation to protect students in non-

residential public schools. They have determined that no "special relationship" exists between schools and their students because students are not in actual custody of the school. In D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992), the Third Circuit found that the state did not owe a duty to a disabled public school student who was sexually assaulted at school by another student. She was attacked repeatedly in a unisex school restroom despite her repeated requests for a single-sex facility. She argued that the school's restraint of her personal liberty during school hours amounted to the kind of custodial relationship experienced by the petitioners in Estelle v. Gamble, 429 U.S. 97, 103 (1976) (The government has an obligation "to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met") and in Youngberg v. Romeo, 457 U.S. 307, 317 (1992) ("When a person is institutionalized – and wholly dependent on the State – it is conceded by petitioners that a duty to provide certain services and care does exist...."). In D.R. v. Middle Bucks, petitioner charged that "custody" arose from the State's compulsory attendance laws and the school standing in loco parentis to its students. The majority opinion did not agree and distinguished the situation from the prisoner in Estelle and the involuntarily institutionalized patient in Youngberg. The court explained that the Estelle/Youngberg type of custody arose from the "full time, severe and continuous State restriction of liberty" that resulted in the plaintiffs' total dependence on the state for life's necessities. The state's complete physical

custody of them gave rise to a consequent duty of care. The court explained that the state did not exercise similar physical custody over a public school student. According to the court, although the school controlled the student's activities during the school day, the state did not restrict her movements to the point of depriving her of her basic needs. Furthermore, the court noted that the state had the student only for the school day. Because she returned home after school, her basic needs were able to be met by her parents. The court concluded that the state did not have a special relationship with the student, which would invoke the due process protections of the Fourteenth Amendment. The dissent, however, found that the state had entered into a special relationship with the student since it had assumed "functional custody" of her. Functional custody was created by a combination of the State's compulsory attendance laws, the school's control over students during school hours, and the student's immaturity. It opposed the majority's analysis of DeShaney that a duty to protect was "triggered only by involuntary, round-the-clock, legal custody." The dissent noted that the school had restricted the student's liberty in two ways. First, it had deprived her of her basic needs when it refused her request for another restroom. Second, the student did not have other meaningful sources of assistance because of her disability and her fear of disclosing the assault. Because the school had designed the unisex facility and disregarded her requests, the state assumed responsibility for the student's safety. In failing to protect her from sexual assault, the dissent concluded that the state had breached the special relationship created

between "vulnerable school children and their public schools."

The dissent in D.R. v. Middle Bucks aligns with Justice Brennan's functional custody standard in DeShaney and represents a better approach in several respects. First, it adopts a totality of the circumstances test for evaluating whether a custodial relationship exists rather than a physical control standard. The totality test takes into account all of the relevant ways in which the state has exercised control over a child during the school day and, therefore, is more comprehensive than a bright line test that merely considers physical custody. In addition, this approach allows courts to consider the actions that the state has taken rather than its inaction. During the school day, the state has control over the child's schedule and determines the child's interactions. While the child is in school, he must depend on the state to secure his safety. During that time, the state has assumed responsibility for his welfare. The fact that the state's control over the child does not extend beyond school hours is irrelevant in light of the nature and extent of state control while the child is on school premises during the school day. Finally, Estelle, Youngberg and DeShaney should not be read so narrowly as to require that the Due Process Clause protections are triggered only by the state's permanent, continuous custody of an individual. Rather, those cases stand for the proposition that the state owes an affirmative duty to a person when it has control over him and then fails to provide for his basic needs.

The courts in DeShaney and subsequent cases misconstrue the special relationship as applied to the state's duty to protect children in two significant respects. DeShaney determined that the state had to have a child in its physical custody to trigger its affirmative duty. However, as Justice Brennan explained, the state "effectively confined" Joshua DeShaney to his father's home through its failed child protection program. The state had "functional custody" over Joshua DeShaney when it had the means to help him, offered others assurances that it was helping him, and then failed him. Justice Rehnquist's narrow interpretation of custody allows the state to "undertake . . . a vital duty and then ignore . . . it" without suffering the consequences of that deliberate decision. The state's duty to protect a child in its custody should be based on the manner in which it has assumed responsibility for the child's safety. When the state controls every aspect of a child's curriculum and schedule in a secondary school, the state should be held liable where a child is unreasonably placed in a position of danger by the state's action. The nature of the state's dominion over the child determines its level of responsibility to the child. The state enters into a special relationship a child when it holds itself out to him as his guardian, has the opportunity and ability to keep him safe, and then fails to do so. Thus, the state deprives a child of his liberty interest in violation of the Due Process Clause of the Fourteenth Amendment. Likewise, in the case at bar, the school created mandatory requirements for attendance and course completion for Georgia's children. Jeremiah Nix attended Paul Brown's electro-mechanical class to meet a graduation requirement

and was under the direct control of his teacher at the time of his death. His school had "functional custody" of him and owed him a duty to keep him safe.

CONCLUSION

For the reasons stated herein, Petitioners request that the writ of certiorari be granted.

Respectfully submitted,

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DATED: February _____, 2003.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11437

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
November 18, 2002
THOMAS K. KAHN
CLERK

(D.C. Docket No. 99-00145-CV-DF-3)

H.L. NIX, ARLENE NIX, Individually and as administrators of the Estate of H.L. Jeremiah Nix, Jr., Deceased,

Plaintiffs-Appellants,

versus

FRANKLIN COUNTY SCHOOL DISTRICT, PAUL E. BROWN, Individually and in his capacity as a Teacher for Franklin County High School; JACK SLATON, Individually and in his capacity as the Principal of Franklin County High School; and THOMAS BRIDGES, Individually and in his capacity as the Superintendent of Franklin County Schools,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(November 18, 2002)

Before ANDERSON and CARNES, Circuit Judges, and POLLAK*, District Judge.

*Honorable Louis H. Pollak, U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

POLLAK, District Judge:

In this civil-rights case, this court is asked to define the contours between harms best left to the province of traditional tort law and those harms that rise to the level of constitutional violations. Appellants H.L. and Arlene Nix, pursuant to 42 U.S.C.§ 1983, brought a civil-rights action against the appellees seeking damages for the death of the Nixes' son, Jeremiah. Finding that the Nixes failed to show that the appellees' conduct violated a right secured by federal law, the District Court granted the appellees' motion for summary judgments as to all of the Nixes' claims. The Nixes brought this appeal. We will affirm the District Court's holding.

I. Factual Background

This case arises from the tragic death of Jeremiah Nix during a classroom demonstration at Franklin County High School. In the fall of 1997, Jeremiah, a 17-year-old student, was enrolled in an electromechanical class taught by defendant Paul Brown. Brown had been teaching the electromechanical curriculum at Franklin County High School for twenty-three years. As a regular part of the class, Brown instructed his class of approximately twenty-five students about the basics of electricity. The curriculum called for students to use volt meters to measure voltages in an electrical current.

On November 3, 1997, Brown was instructing the class on the use of a volt meter. In order to give his students the opportunity to operate a volt meter

themselves, Brown had arranged a single insulated wire across the students' desks. At various points along the length of the wire, the insulation had been cut away and the wire exposed so that the students could place the probes from their voltage meters onto exposed wire. The wire was then connected to an adjustable transformer, which Brown controlled. After checking to ensure that the probes were all properly attached to the exposed areas of the wire, Brown turned on the transformer and began to increase the voltage in graduated increments, with a peak voltage of 700 volts. Brown chose to bring the current to 700 volts so that the students might measure voltages spanning the full range of values permitted by the meters, which were capable of reading up to 750 volts. Brown repeatedly warned the students about the risk of touching the exposed wires.

While the voltage-reading demonstration was taking place, Jeremiah Nix was seated at a table with two other students. Brown sat across the table from the three students. Jeremiah and the other students asked Brown several questions about the possible effects that would result if they touched the wire. Brown explained to them that if they touched the wire with both hands, the electricity would flow across the heart and possibly cause death. Accordingly, Brown told the students not to touch the wire.

While the transformer was operating at the 700-volt level, Brown turned to answer a question posed by one of the students seated to his left. When he turned back to the table in front of him, he noticed that Jeremiah was leaning over to his left with the wire in his hands. Brown

immediately cut off the power to the transformer and sought to assist Jeremiah, who was gasping for breath. Brown raised Jeremiah's arms in an attempt to help him breathe. Some of the other students ran across the hall for assistance, and another teacher came into the classroom and helped Brown perform CPR on Jeremiah. Emergency medical technicians were called to the school, but the efforts to revive Jeremiah were unsuccessful – he died from the electrical shock.

The Nixes have presented some evidence that Brown was aware of substantial risks to the students in his class. Arlene Nix, Jeremiah's mother, has given deposition testimony that the electrical equipment in the classroom "kept blowing fuses and it kept showing it was off and on." In addition, Brown was aware that students often touched the electrical probes and that some students were being shocked. He knew that students in a group as large as his class would inevitably touch live wires, that students would occasionally "get their hands in the wrong place at the wrong time" and that some students were intentionally shocking themselves or one another. Others in the school were also alerted to possible problems: a few days prior to Jeremiah's electrocution, the mother of one of Brown's students called the high school because she had learned from her son that students were being shocked in the class. She expressed concern for the safety of the pupils in the course, and was assured that there was no need for concern and that she would be contacted by either the Principal or his assistant. The promised response from the school never came.

Assistant Principal Stanley Whitsitt testified that, from a safety standpoint, the curriculum has not been changed since 1974. Whitsitt testified as to his belief that the Principal and Vice Principal were aware that live electricity was being used in Brown's classroom. Brown testified that his experimental methodology had become a "custom" after so many years of being used in the class, and that his superiors were aware of that custom. However, Principal Jack Slaton denied any knowledge that 700 volts of electricity were being used.

II. Procedural History

H.L. and Arlene Nix, Jeremiah's parents, filed a § 1983 complaint on October 23, 1999. They named as defendants: the school district; Brown; Principal Slaton; and Thomas Bridges, Superintendent of the Franklin County School District. In their complaint, the Nixes alleged that the defendants' actions deprived Jeremiah of his due-process rights under the Fourteenth Amendment by placing him at an unreasonable risk of harm.

After discovery, all defendants moved for summary judgment, based on qualified immunity and the more general defense that no constitutional violation occurred. The District Court granted summary judgment for all defendants on all claims.

III. General Due Process Principles

The crucial inquiry for this court is whether the alleged facts, if true, would amount to a constitutional violation. As a general rule, to prevail on a claim of a

substantive due-process violation, a plaintiff must prove that a defendant's conduct "shocks the conscience." *Count of Sacramento v. Lewis,* 523 U.S. 833, 836, 846-7 (1998).

A. Conduct that is "conscience-shocking"

The somewhat nebulous "shocks the conscience" phrase has taken on different meanings in different cases, depending on a given case's factual setting. For many contexts, the Supreme Court has yet to determine how serious misconduct must be to be characterized as "conscience shocking" (a standard which "duplicates no traditional category of common-law fault," *id.* at 848), but the Court has made clear that a showing of mere negligence is insufficient to make out a constitutional due-process claim: "[Liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 849; *see also Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986); *Daniels v. Williams*, 474 U.S. 327, 330-32 (1986). The Court has, however, pointed out that actions "intended to injure in some way unjustifiable by any government interest" are those "most likely to rise to the conscience-shocking level." *Sacramento*, 523 U.S. at 849. Acts that fall between the poles of negligence and malign intent require courts to make "closer calls," *id.* at 849, in which the determination of what shocks the conscience is context-specific. "Deliberate indifference that shocks in one environment may not be so patently egregious in another...." Id. at 850.

B. Avoiding the encroachment of substantive due process into the tort field

Before proceeding to analysis of the Nixes' due-process claim, we must pause to consider the pronouncements of the Supreme Court regarding the boundaries separating tortuous injuries from constitutional harms. "As a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this [uncharted] area are scarce and open-ended." *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992). When shaping the contours of due-process law, the Court has often emphasized the need to prevent the Fourteenth Amendment from becoming a surrogate for conventional tort principles. Confining liability to more culpable actors, as suggested in Sacramento, is in accordance with the intent of the Due Process Clause: "'to secure the individual from the arbitrary exercise of the powers of government.'" *See Daniels*, 474 U.S. at 331 (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)). In *Daniels*, the Court found that an inmate plaintiff's slip-and-fall incident at a jail was "quite remote" from the concerns of the Due Process Clause. *Id.* at 332. The Court went on to say:

> Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

> ...Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that "'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Paul v. Davis*, 424 U.S. 693, 01 (1976), quoted in *Parratt v. Taylor*, 451 U.S. [527, 544 (1981)].

Id.

III. Analysis of the Nixes' Claims

Mindful of the Supreme Court's expressed reluctance to expand the due-process jurisprudence into areas of conventional tort law, we must determine, in the context of this case, what level of culpability would be needed to give rise to a constitutional claim. In their complaint, the Nixes alleged that the actions of the defendants "were particularly arbitrary, reckless, and deliberately indifferent." Therefore, the claims fall in the middle range of the culpability spectrum and call for the court to decide if the due-process umbrella spreads wide enough to shelter claims of recklessness and/or deliberate indifference in the high-school setting in which Jeremiah's death occurred.[1]

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1. For purposes of this discussion, we will equate claims of recklessness and claims of deliberate indifference. See Farmer v.

We will assume *arguendo* that the actions of the defendants were, as the Nixes assert, deliberately indifferent to Jeremiah's safety. That assumption made, the threshold matter of whether that deliberate indifference would constitute a due-process violation remains to be decided. We are aware of no case law directly on point, and so will proceed by evaluating the most analogous cases and concepts, which will serve as the landmarks with which to triangulate the correct placement of this case on the existing landscape of substantive due-process decisions.

A. Cases involving claims of government employees arising out of unsafe working conditions

In keeping with the general policy of avoiding overlap between due-process and ordinary tort claims, courts have held, in fact situations somewhat similar to the current one, that no due-process liability attaches. For instance, the Supreme Court, when faced with a claim against a city by the widow of a city employee who was asphyxiated after entering a manhole to unstop a sewer line, stated:

> We...are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary,

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Brennan, 511 U.S. 825, 836 (1994) ("It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.").

> or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment...[W]e have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.

Collins v. City of Harker Heights, Texas, 503 U.S. 115, 128 (1992) (citations omitted). The Due Process Clause "does [not] guarantee municipal employees a workplace that is free of unreasonable risks of harm." *Id.* at 129.

This court has been explicit in stating that "deliberate indifference" is insufficient to constitute a due-process violation in a non-custodial setting: "While deliberate indifference to the safety of government employees in the workplace may constitute a tort under state law, it does not rise to the level of a substantive due process violation under the federal Constitution." *White v. Lemacks*, 183 F.3d 1253, 1259 (11th Cir. 1999) (no § 1983 liability where nurse, while working in jail infirmary, was beaten by inmates).

Both *Collins* and *White* reflect judicial reluctance to second-guess policy decisions about resources to be allocated to safety, which are best left to "locally elected representatives, rather than...federal judges interpreting the basic charter of Government for the entire country." *Collins*, 503 U.S. at 128-129; *see also White*, 183 F.3d at

1258 (quoting *Collins* and further noting that "when someone not in custody is harmed because too few resources were devoted to their safety and protection, that harm will seldom, if ever, be cognizable under the Due Process Clause").

Like the government workers injured in *Collins* and *White*, Jeremiah Nix was "not in custody." This court has ruled that schoolchildren are not in a custodial relationship with the state. *See Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 569 (11th Cir. 1997). In *Wyke*, the mother of a junior-high-school- student who committed suicide at home sued school officials under § 1983. The plaintiff alleged that by failing to act after her son had twice attempted suicide at school, the school officials had shown deliberate indifference to the student's right. This court held that school attendance laws did not restrain personal liberty in a way that placed an affirmative duty on the school to provide for the student's "'safety and general well-being.'" *Id.* (quoting *DeShaney v. Winnegabo County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989)).

B. Cases in school settings

The *Collins* and *White* cases, while instructive, do not address due-process claims by a student against school personnel. There are, however, two decisions of this court that, together, show that even intentional acts directed toward students will not necessarily give rise to a constitutional claim.

In *Dacosta v. Nwachukwa*, 304 F.3d 1045 (11th Cir. 2002) (*per curiam*), a student sued her college instructor

for battery. This court refused to permit the intentional tort of battery to swell to constitutional proportions: "In the instant case, *Dacosta*...cannot point to any authority holding that a battery perpetrated by a college teacher upon an adult student rose to the level of a substantive due process violation." *Id.* at 1049. *Dacosta*, then, shows that even an act at the upper end of the culpability spectrum – an intentional act – will not necessarily support a due-process claim.

Only in the limited context of due-process claims based on excessive corporal punishment has this court held that the intentional conduct of a high-school educator may shock the conscience. In *Neal v. Fulton County Board of Education*, 229 F.3d 1069, 1076 (11th Cir. 2000), we held that a plaintiff had sufficiently alleged a due-process claim where a coach had struck a student with a "weight lock" and knocked the student's eye out of socket. In his attempt to punish the student's behavior, the coach employed an obviously excessive amount of force that "truly reflect[ed] the kind of egregious official abuse of force that would violate substantive due process protections." *Id.* Importantly, the *Neal* opinion makes clear that considerations unique to claims of excessive corporal punishment – claims not present in *Dacosta* or the case at bar – shaped the outcome. *See id.* (referring specifically to the student's "right under the Fourteenth Amendment to be free from excessive corporal punishment").

C. The Nixes' case

From the cases just discussed, two principles emerge: (1) generally, those individuals not in state custody will have no due-process claim for unsafe conditions; and (2) specifically, in a classroom setting, courts have not allowed due-process liability for deliberate indifference, and, moreover, will only allow recovery for intentional conduct under limited circumstances. Examining the Nixes' case in light of those concepts, we conclude that allegations of "deliberate indifference" do not, in this fact situation, "shock the conscience" in a way that gives rise to a due-process violation. The holding of the *Dacosta* case supports this outcome: if a teacher's intentional tort (as in *Dacosta*) does not "shock the conscience," the deliberate indifference attributed, in the case at bar, to Brown cannot survive summary judgment.[2] To extend the protections of the Fourteenth Amendment to the Nixes would balloon this circuit's due-process jurisprudence well beyond its current confines.

Today's holding also comports with the Supreme Court's mandate to remain vigilant in policing the boundaries separating tort law from constitutional law. Substantive due process is a doctrine that has been kept

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2. To be sure, *Dacosta* differed in some ways from this case: the former case involved an older student in a collegiate setting, who was presumably not subject to compulsory attendance rules. However, this court finds that the two cases are similar enough to necessitate the same result. Still, it is important to note that today's holding is a narrow one; it would not necessarily control, say, a similar accident in a 4th-grade classroom, or even other types of seriously harmful behavior occurring in a high-school class.

under tight reins, reserved for extraordinary circumstances. The Nixes' claims do not present such circumstances and are properly confined to the realm of torts.[3] The conditions in the electromechanical course, while truly unfortunate, do not rise to the level of an affront of constitutional dimension.

AFFIRMED.

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3. The District Court arrived at the same conclusion and relied heavily upon the Supreme Court's decision in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989), which stated that "[a]s a general matter...a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." In weighing the Nixes' argument that *DeShaney* "does indeed 'leave room' for state liability where the state creates a danger or renders an individual more vulnerable to it," *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 567 (11th Cir. 1997), the District Court held that the electrical experiment was not the type of state-created danger contemplated by the Wyke court.

Because we hold that the Nixes' allegations fail to satisfy the most basic requirements of a valid due-process claim, we express no opinion on the applicability of *DeShaney* to the facts of this case.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

H.L. NIX and ARLENE NIX, Individually and as Administrators of the Estate of H.L. JEREMIAH NIX, JR., Deceased, Plaintiffs,	:	
v.	:	Civil Action No. 3:99-cv-145 (HL)
FRANKLIN COUNTY SCHOOL DISTRICT; PAUL E. BROWN, Individually and in his capacity as a Teacher for Franklin County High School; JACK SLATON, Individually and in his capacity as the Principal of Franklin County High School; and THOMAS BRIDGES, Individually and in his capacity as the Superintendent of Franklin County Schools, Defendants.	:	Filed at 3:05 PM Date 2/12/02 Deputy Clerk, U.S. District Court Middle District of Georgia

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Gregory J. Leonard, Clerk
By: s/ Gregory J. Leonard
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ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

This case arises from the tragic death of Jeremiah Nix during a classroom demonstration at Franklin County High School. The parents of Jeremiah Nix have brought a claim for damages pursuant to 42 U.S.C. § 1983, alleging that the acts of the Defendants resulted in a deprivation of Jeremiah's constitutional rights. Presently before the Court is Defendants' Motion for Summary Judgement [Tab 36]. After careful consideration of the briefs of counsel, case law, and the record, the Court grants Defendants' Motion for the reasons set forth below.

I. Findings of Fact

In the fall of 1997, Jeremiah Nix, a 17-year-old student at Franklin County High School, was enrolled in an exploratory class in the electromechanical arts. The electromechanical classes were taught by Paul Brown. Brown had been teaching the electromechanical curriculum at Franklin County High School for 23 years. As a regular part of the class, Brown instructed his students in the basics of electricity, such as the flow of electricity and the use of meters to determine volt levels.

On November 3, 1997, Brown was instructing the class on the use of a volt meter. In order to instruct the students, Brown had arranged a single insulated wire across the students' desks. The wire had been exposed, at widths of about one-half inch, at six-inch intervals, so that the students could put the probes from their voltage meters onto exposed wire. The wire was then connected to

an adjustable transformer, which Brown controlled. After checking to insure that the probes were all properly attached to the exposed area of the wire, Brown turned on the transformer and began to increase the voltage in increments, continuing to increase the voltage until it reached 700 volts. Brown chose to bring the voltage to 700 volts because the meters the students were being trained to read were capable of reading up to 750 volts. Brown repeatedly warned the students about the risk of touching the exposed wires.

While the voltage reading demonstration was taking place, Jeremiah Nix was seated at a table with two other students. Brown sat across the table from all the three students. Nix and the other students asked Brown several questions about the possible effects that would result if they touched the wire. Brown explained to them that if they touched the wire with both hands, the electricity would flow across the heart and stop the heart. Brown told the students not to touch the wire.

While the transformer was operating at the 700-volt level, Brown turned to answer a question posed by one of the students seated to his left. When he turned back to the table in front of him, he noticed that Jeremiah Nix was leaning over to his left and had the wire in his hands. Brown immediately cut off the power to the transformer and went to see to Nix. Nix was gasping for breath and Brown raised Nix's arms in an attempt to help him breathe. Some of the students ran across the hall for assistance, and another teacher came into the classroom and helped Brown give Nix CPR. Emergency medical technicians were called to the school; however, efforts to

revive Nix were unsuccessful and Nix died from electrical shock.

II. Procedural History

Approximately two years after the death of their son Plaintiffs, H.L. Nix and Arlene Nix, individually and as administrators of the estate of Jeremiah Nix, brought the lawsuit at issue here, naming Brown as a Defendant, individually and in his capacity as a teacher at Franklin County High School. Plaintiffs also named as Defendants the Franklin County School District; Jack Slaton, individually and in his capacity as the Principal of Franklin County High School; and Thomas Bridges, individually and in his capacity as the Superintendent of Franklin County Schools. In their complaint, brought pursuant to 42 U.S.C. § 1983, Plaintiffs allege Defendants placed Jeremiah at an unreasonable risk of harm by using unsafe equipment and following unsafe practices. Plaintiffs further allege that Defendants' actions served to deprive Jeremiah of his constitutional rights under the Fourteenth Amendment to the United States Constitution.

After the parties had the opportunity to engage in discovery, all Defendants moved for summary judgement, contending they are entitled to qualified immunity as to the claims brought against them in their individual capacities, and that they are entitled to summary judgement with respect to the official capacity claims because Plaintiffs cannot show that the injury to their son stemmed from a custom or policy of the Franklin County School District. The Court will address each of Defendants' arguments below.

III. Conclusions of Law

It is well-established that 42 U.S.C. § 1983 " 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" Graham v. Connor, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 1870 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 2694 n.3 (1979)). Therefore, in order to establish a § 1983 claim, a plaintiff must show a violation of a right secured by federal law. Skinner v. City of Miami, 62 F.3d 344, 347 (11th Cir. 1995). In addition, in order to recover against a government official, a plaintiff must show that the defendant official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982).

Thus, as to the claims against Defendants in their individual capacities, two questions are presented to this Court for determination: Whether Plaintiffs have shown a violation of a right secured by federal law; and, if so, whether that right was clearly established on November 3, 1997.

A. Whether Plaintiffs have Shown a Violation of a Right Secured by Federal Law.

In this case Plaintiffs contend Defendants' actions served to violate Jeremiah's Fourteenth Amendment rights, so as to give rise to a § 1983 claim, by depriving him of his rights to physical safety, liberty, and life. Plaintiffs' claim thus invokes the substantive component of the Due Process

Clause, rather than the procedural component, as Plaintiffs do not contend Defendants denied Jeremiah protection without according him appropriate procedural safeguards. Rather, Plaintiffs contend Defendants exposed Jeremiah to an unreasonable risk of danger.

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. However, as the Supreme Court of the United States has noted, the "Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 195, 109 S. Ct. 998, 1003 (1989). Thus, courts have frequently cautioned litigants against using the Fourteenth Amendment as "'a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" Albright v. Oliver, 510 U.S. 266, 284, 114, S. Ct. 807, 818 (1994)(quoting Parratt v. Taylor, 451 U.S. 527, 544, 101 S. Ct. 1908, 1917 (1981)). The Court explained in DeShaney that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." DeShaney, 489 U.S. at 195, 109 S. Ct. at 1003.

Although noting the absence of a generalized duty to protect arising from the Fourteenth Amendment, the Court nevertheless recognized that "in certain limited circumstances," a state may have an affirmative duty to provide protection to particular individuals. Id. at 198, 109 S. Ct. at 1004. The Court emphasized, however, that an

"affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." Id. at 200, 109 S. Ct. at 1005-06. The Court elaborated on those circumstances in which a State's conduct might give rise to a due process violation:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 200, 109 S. Ct. at 1006.

Those courts that have attempted to apply the decision in DeShaney in other factual contexts have concluded that DeShaney "'leave[s] room' for state liability where the state creates a danger or renders an individual more vulnerable to it. Wyke v. Polk County Sch. Bd., 129 F.3d 560, 567 (11th Cir. 1997). However, those courts have also noted that "[e]xactly what type of state action fits within that exception has been the subject of considerable debate." Id. In Wyke, for example, the United States Court of Appeals for the Eleventh Circuit had the occasion to consider whether school officials, who knew of a student's threats of suicide, had a constitutional duty to take steps

to protect the student from harming himself or to notify his family of his threats. The court ultimately concluded that the school had no constitutional duty toward the student, although the court found that the school had a duty to protect the student under Florida law.

Other circuit courts that have considered the question of when a school has a duty to ensure the safety of its students have been reluctant to expand a school's duty to constitutional proportions. In J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990), the Seventh Circuit found no injury of a constitutional dimension stemming from the molestation of a student by a teacher. After reviewing the decision in DeShaney, and related case law, the Seventh Circuit concluded that in requiring children to attend school the state did not render "its schoolchildren so helpless that an affirmative constitutional duty to protect arises." J.O., 909 F.2d at 272. Distinguishing the situation of the student from those limited situations in which the Supreme Court had previously recognized an affirmative constitutional duty to protect the court noted, "Schoolchildren are not like mental patients and prisoners such that the state has an affirmative duty to protect them." Id. at 272-73. As did the Court in DeShaney, the Seventh Circuit pointed out that the state might have an obligation to protect under state law, even where no constitutional duty could be found. Id. at 272.

This case presents a situation different from that in either Wyke or J.O., however, because here a condition created by the school was the source of the injury resulting in Jeremiah Nix's death. Thus, the facts of this case make

it more analogous to those in which "the state creates a danger or renders an individual more vulnerable to it." Wyke, 129 F.3d at 567. Nevertheless, the Court is reluctant to find that Defendants violated a constitutional duty owed to Jeremiah, as one of its students, even though he was exposed to risk of harm during the electromechanical course. To do so would, in effect, make a school a guarantor of its students' safety and would improperly expand the scope of substantive due process jurisprudence. *See, e.g.*, Wright v. Lovin, 32 F.3d 538, 540 (11th Cir. 1994) (noting that "substantive component of the Due Process Clause protects only those rights that are fundamental" and that "tort law remains largely outside the scope of substantive due process jurisprudence").

Despite the fact that electricity is inherently dangerous, and its use thus exposes some students to risk of harm, this Court is of the opinion that Brown's use of the transformer and volt meters in the electromechanical course is not the type of "state-created danger" contemplated by the Eleventh Circuit in Wyke. The exposure to electricity giving rise to the injury here occurred in a controlled, classroom setting and thus the danger posed by it was not unlike the danger posed by a power saw in a shop class, a car battery in an automobile repair class, a swimming pool in a physical education class, or even a gas oven in a home economics class. In any of these settings, if the dangerous instrument is not properly used, it poses a risk of harm, and schools should go to great lengths to see that such harms are minimized or avoided, but these are not the types of harm as to which a school has a *constitutional* duty to protect its students. Accordingly, the Court finds that Plaintiffs have failed to

show a violation of a right secured by federal law, in that the Fourteenth Amendment does not require a school to protect its students from the type of harm at issue here.

B. Whether the Right was Clearly Established on November 3, 1997.

Even if this Court were to conclude that under the circumstances of this case Defendants had a constitutional duty to protect Jeremiah Nix from harm, in order to hold Defendants individually liable, Plaintiffs would still have the burden of showing "that when the defendants acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts to be unlawful." Spivey v. Elliott, 41 F.3d 1497, 1499 (11th Cir. 1995) (citing Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987)). If Plaintiffs fail to meet their burden of showing that the law was clearly established, Defendants are entitled to qualified immunity. Id.

In order to discharge their burden of showing that the law was clearly established "to the point that qualified immunity does not apply," Plaintiffs must show that the law has "been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." Lassiter v. Alabama A & M University, 28 F.3d 1146, 1149 (11th Cir. 1994). The burden on a plaintiff in such a situation is a heavy one: "That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in

their individual capacities. Id. Furthermore, "[b]ecause qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity." Id.

In responding to Defendants' qualified immunity argument, Plaintiffs maintain they have shown the violation of a clearly established right secured by the Constitution or other federal law because "Defendants' actions and omissions deprived Jeremiah Nix of his right to life, his right to physical security, his right to a safe and secure environment, and deprived Mr. and Mrs. Nix of their right to their son." (Pls.' Resp. Defs.' Mot. Summ. J. at 13). Plaintiffs thus rely on the guarantees of the Due Process Clause for their contention that the right at issue was clearly established. However, as the result in DeShaney makes clear, a plaintiff's decision to base a claim on "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." DeShaney, 489 U.S. at 202, 109 S. Ct. at 1006.

Case law makes clear that merely relying on broad constitutional principles is insufficient to satisfy a plaintiff's burden where qualified immunity issues are concerned. Plaintiffs must show that the contours of the constitutional right at issue have developed to the point that the defendants should have known that their conduct was wrong. *See, e.g.*, Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 827, (11th Cir. 1997)(en banc)(noting that "school officials cannot be required to construe general legal formulations that have not once

been applied to a specific set of facts by any binding judicial authority"). Here, Plaintiffs have failed to cite the Court to any controlling authority that would have put Defendants on notice that they had a constitutional duty to protect Jeremiah Nix from the risk of harm presented in the classroom. [1]

In view of the foregoing, it cannot be said that Plaintiff's have met their burden of showing that Defendant school officials violated a clearly estab-lished constitutional right by failing to protect Jeremiah Nix. Defendants Brown, Slaton, and Bridges are, therefore, entitled to qualified immunity as to any individual liability charged against them under § 1983.

C. Plaintiff's Custom, Practice or Policy Claims

In addition to their contention that Defendants had an affirmative constitutional duty to protect Jeremiah Nix from harm, Plaintiffs contend the School District and the official capacity Defendants are liable because they were deliberately indifferent to the risk of harm to Jeremiah and because they implemented a custom, practice, or policy which resulted in injury to Jeremiah. Local governments,

1. "In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." Jenkins, 115 F.3d at 826 n.4. Some courts also hold that the existence of clearly established law can be shown "through reference to 'a consensus of cases of persuasive authority.'" Bevill v. UAB Walker College, 62 F. Supp. 2d 1299 (N.D. Ala. 1999) (quoting Wilson v. Layne, 526 U.S. 603, 119 S. Ct. 1692 (1999)).

including school boards, can be subject to § 1983 liability "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Monell v. Department of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38 (1978). Local government liability is not predicated on a theory of respondeat superior, however. Rather, a plaintiff seeking to succeed on such a claim must show that the policy or practice is the "moving force of the constitutional violation" at issue. Id. at 694, 28 S. Ct. at 2038. Local governments can also be subject to § 1983 liability if training, supervision, or scrutiny in hiring is so inadequate as to demonstrate "deliberate indifference to the rights of the persons with whom the [state actors] come into contact." City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204 (1989). Because a government's liability under a failure to train theory is part of a policy or custom analysis, a plaintiff must prove that an underlying constitutional violation occurred and that the failure to train was the "'moving force [behind] the constitutional violation.'" Id. at 389, 109 S. Ct. at 1205 (quoting Monell, 436 U.S. at 694, 98 S. Ct. at 2037).

Here, Plaintiffs have offered evidence demonstrating that issues of fact exist with respect to whether other students had been shocked during electricity demonstrations in Brown's classrooms and with respect to whether the general attitude of Brown and the students toward the electrical experiments was one of levity, so that students, such as Nix, were at greater risk for injury. While this evidence might support their claim that the school was deliberately indifferent to the welfare of its students, this

Court's conclusions in the preceding section – that Jeremiah Nix suffered no constitutional injury as a result of the conduct of the individual Defendants – forecloses on any claim for liability against the School District or the official capacity Defendants. As the Supreme Court has noted, a plaintiff has no right to recover against a governmental entity when there has been a determination that no constitutional injury has been inflicted: "If a person has suffered no constitutional injury at the hands of the [individual defendants], the fact that the departmental regulations might have *authorized* the [offensive conduct] is quite beside the point." City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 1573 (1986).

Thus, even though the School District approved the curriculum, including the electromechanical courses, and even though the school officials may have known of incidents in which students were shocked, yet failed to act on this knowledge, if there is no injury that arises to the level of a constitutional injury, there can be no liability under § 1983. Accordingly, the claim against the School District, and the claims against Brown, Slaton, and Bridges in their official capacities must fail.

IV. Conclusion

The Court finds that Plaintiffs have failed to show that Defendants' conduct served to violate a right secured by federal law. In the alternative, the Court finds Plaintiffs have failed to show that the right which gives rise to their § 1983 claim was clearly established on November 3, 1997. Furthermore, in the absence of a constitutional injury, the Plaintiff cannot recover under § 1983 against

the School District and the Defendants sued in their official capacities. Accordingly, Defendants are entitled to summary judgement as to all claims against them.

SO ORDERED, this the 12th day of February, 2002.

By: s/ Hugh Lawson

HUGH LAWSON, JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit
No. 02-11437
District Court Docket No.
99-00145-CV-DF-3

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Nov 18, 2002
THOMAS K. KAHN
CLERK

H. L. NIX,
ARLENE NIX,
Individually and as administrators of the estate of H.L. Jeremiah Nix, Jr., Deceased,

Plaintiffs-Appellants,

versus

FRANKLIN COUNTY SCHOOL DISTRICT, PAUL E. BROWN, Individually and in his capacity as a Teacher for Franklin County High School, JACK SLATON, Individually and in his capacity as the Principal of Franklin County High School, THOMAS BRIDGES, Individually and in his capacity as the Superintendent of Franklin County School,

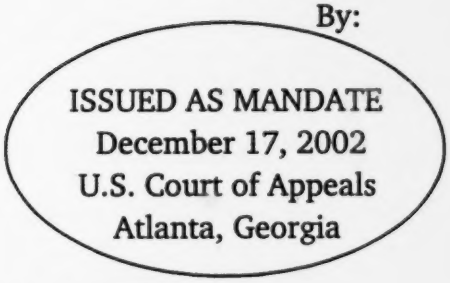
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: November 18, 2002
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy



Charles W. Stephens
Attorney at Law
Suite 101 - 210 Washington Street, N.W.
Gainesville, GA 30501

December 17, 2002

RE: 02-11437-FF H. L. Nix v. Franklin Co. School
DC DKT NO.: 99-00145 CV-DF-3

TO: Gregory J. Leonard

CC: Charles W. Stephens

CC: Harry Warren Bassler

CC: Administrative File